CHAN YOKE LAIN

v.

PACIFIC & ORIENT INSURANCE CO SDN BHD

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: W-02-487 OF 1997]
5 OCTOBER 1998

INSURANCE: *Formation of contract - Agency - Ratification - Signature on proposal form not that of insured - Whether contract of insurance ratified when agent accepted premium - Absence of collusion, connivance or fraud - Adverse inference - Contracts Act 1950, s. 149 - Insurance Act 1996, s. 151*

CONTRACT: *Insurance - Formation - Agency - Ratification - Signature on proposal form not that of insured - Whether contract of insurance ratified when insured paid premium - Absence of collusion, connivance or fraud - Adverse inference - Contracts Act 1950, s. 149 - Insurance Act 1996, s. 151*

The appellant herein was the deceased's wife (and now the administratrix of the deceased's estate). This was her appeal against the decision of the High Court dismissing her claim against the respondent under a personal accident policy ('the policy') issued by the respondent to the deceased. The respondent had earlier repudiated liability in respect of the policy on the sole ground that the signature on the proposal form was not that of the deceased. The only issue for determination in this appeal was whether (even assuming that the signature was not that of the deceased) the respondent could repudiate liability after the deceased had ratified the proposal by paying the premium to the authorised agent of the respondent ('the agent') which had then issued a cover note to the deceased.

Held:
Per Haidar Mohd Noor JCA

[1] The learned judge should have considered s. 149 of the Contracts Act 1950 and s. 151 of the Insurance Act 1996 as the issues of agency and ratification were well before him. Clearly, the person who signed the proposal form was not acting for himself but on behalf of the deceased. Thus, although the proposal form for the policy was not signed by the deceased, it was ratified by him when he paid the premium for the policy and received a receipt from the respondent acknowledging the payment.

[1a] There was no evidence of collusion or connivance between the agent and the deceased or of fraud in the formation of the contract of insurance; hence, the respondent could not repudiate its liability.

[2] The learned judge should have invoked s. 114(g) of the Evidence Act 1950 against the respondent for failing to call the agent or the agent's clerk who filled up the proposal form. The irresistible inference was that their evidence would have been unfavourable to the respondent.

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu di sini merupakan isteri simati (dan kini adalah pentadbir harta simati). Ini adalah rayuannya terhadap keputusan Mahkamah Tinggi yang menolak tuntutannya terhadap responden di bawah satu polisi kemalangan peribadi ('polisi tersebut') yang dikeluarkan oleh responden kepada simati. Responden telah pada awalnya menolak tanggungan berhubung dengan polisi atas alasan tandatangan pada borang cadangan bukannya tandantangan simati. Satu-satunya isu untuk penentuan dalam rayuan ini adalah samada (sungguhpun menjangkakan bahawa tandantangan tersebut bukannya merupakan tandantangani simati) responden boleh menolak tanggungan selepas simati telah memperbetulkan cadangan itu dengan membayar premium kepada ejen sah responden ('ejen tersebut') yang mana telah kemudiannya mengeluarkan satu nota perlindungan kepada simati.

Diputuskan:
Oleh Haidar Mohd Noor HMR

[1] Hakim yang bijaksana seharusnya mempertimbangkan s. 149 Akta Kontrak 1950 dan s. 151 Akta Insurans 1996 kerana isu-isu ejensi dan ratifikasi nyata terdapat di hadapannya. Jelasnya, orang yang telah menandatangi borang cadangan tersebut tidak bertindak bagi dirinya sendiri tetapi bagi pihak simati. Dengan itu, walaupun borang cadangan bagi polisi tersebut telah tidak ditandatangani oleh simati, ianya telah diratifikasikan oleh simati ketika beliau membayar premium bagi polisi tersebut dan telah menerima satu resit daripada responden yang mengakui penerimaan pembayaraan tersebut.

[1a] Tidak terdapat sebarang keterangan mengenai pakat-sulit antara ejen dan simati tersebut atau mengenai fraud dalam formasi kontrak insuran tersebut; dengan itu, responden tidak boleh menolak tanggungannya.

[2] Hakim yang bijaksana seharusnya menggunakan s. 114(g) Akta Keterangan 1950 terhadap responden kerana gagal untuk memanggil ejen atau kerani ejen yang telah mengisi borang cadangan tersebut. Inferens yang tidak boleh dielakkan adalah bahawa keterangan mereka mungkin tidak memihak kepada responden.

[Rayuan dibenarkan.]

Cases referred to:
Borhanuddin Hj Jantara & Anor v. American International Assurance Co Ltd [1986] 1 CLJ 532 ***(refd)***
Keeling v. Pearl Assurance Co Ltd [1923] All ER 309 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 21, 149
Evidence Act 1950, s. 114(g)
Insurance Act 1996, s. 151

Other source referred to:
Indian Contract and Specific Relief Acts, Pollock & Mulla, 11 edn, vol II, pp 1119/1120

For the appellant - En Menon (Varghese Onny with him); M/s Jaffar & Menon
For the respondent - En Kanagasabapathi; M/s RK Nathan & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S5-22-25-96; [1997] 4 CLJ Supp 8]

Reported by Gan Peng Chiang

JUDGMENT

Haidar Mohd Noor JCA:

Chan Yoke Lain, as administrator of the estate of Chong Yoke Fah, deceased, (appellant), filed an action against Pacific & Orient Insurance Co. Sdn. Bhd. (respondent) for a sum of RM440,000 under the personal accident policy ('PA policy') issued by the respondent company to the deceased. In addition thereto, there is a claim for RM508 for costs of Letters of Administration and other disbursements and costs of the proceedings.

The learned judge, after a full hearing, dismissed the action with costs. Hence this appeal before us.

Brief Facts

The appellant was the wife of the deceased at the material time though she has since remarried.

The respondent company issued two insurance policies at the material time prior to the deceased's death, namely:

(a) a comprehensive motor insurance policy for the deceased's Honda motor car no. WCN 9012.

(b) a PA policy for RM440,000 in the event of death.

Upon the deceased's death on 27 November 1992 as a result of a motor accident whilst driving his motor car no. WCN 9012, the estate was paid RM15,957 on the motor insurance policy by the respondent company.

In respect of the claim on the PA policy for RM440,000, the respondent company repudiated liability on the sole ground that the signature of the deceased which appeared on the proposal form ('D2') was not that of the deceased. It was alleged to be a forged signature of the deceased.

Issue

The only issue is whether (even assuming the signature on the proposal form of the PA policy was not that of the deceased) after the deceased had ratified the proposal by having the premium paid to David Lim Risk Management Sdn. Bhd. the authorised agent of the respondent company which subsequently issued the PA policy, can the respondent company repudiate liability?

The learned judge, after concluding that the deceased did not sign on D2, proceeded to consider at length the legal consequence.

His consideration is grounded as follows:

(a) there was no offer by the insured (deceased) since he did not sign on the proposal form (D2) and therefore there can be no acceptance by the insurer (respondent company) and when there is no acceptance, there can be no contract. Any contract purported to be created will be void *ab initio*;

(b) the parties are not really in consensus *ad idem*;

(c) mistake, citing s. 21 of the Contracts Act 1950.

At the hearing of the appeal, counsel for both parties agreed that mistake was not pleaded (see p. 30(A) of the Appeal Record). It was also agreed that the issue of mistake was also not submitted to the learned judge (see pp. 108 to 120 of the Appeal Record regarding written submissions). We would therefore leave out the issue of mistake from our consideration. In any event it is not a relevant issue in so far as it concerned our decision for allowing the appeal.

Interestingly enough, the learned judge in considering the issue of offer and acceptance, answered in the negative the question – can it be said that the offer to insure is moved by the proposer? Apparently the negative answer was arrived at on the basis of what he perceived to be that no agency was raised. This is what he said in his judgment (p. 23 of the Appeal Record):

> ... (barring any inferences of agency which is never raised in this case) ...

Obviously the learned judge was wrong as para. 4 of the statement of claim under the heading "particulars of Personal Accident Insurance" the cover note no. A0097177 was issued by the respondent company's agent, David Lim Risk Management Sdn. Bhd. Arising from the issuance of the cover note by its agent, the PA policy no. 0286920A 000021 was issued by the respondent company on 10 August 1992 for the period 11 July 1992 to 10 July 1993. Therefore at the time of the death of the insured, the PA policy was in force. It is not disputed that the insured died as a result of a motor accident involving his car no. WCN 9012 covered by the insurance policies issued by the respondent company.

It is not disputed that David Lim Risk Management Sdn. Bhd. was the authorised agent of the respondent company. This is confirmed by its Claims Manager, Parry a/l N.R. Ramanunjam (DW1). Further, DW1 did not dispute that David Lim Risk Management Sdn. Bhd. issued the cover note as its agent that resulted in the PA policy being issued subsequently by the respondent company (see pp. 40/41 of the Appeal Record). An examination of the cover note (p. 125 of the Appeal Record) clearly showed that it was issued in conjunction with motor cover note 1325078 for vehicle no. WCN 9012 (see p. 125 of the Appeal Record). DW1 went on further, under cross-examination, to say at p. 42 of the Appeal Record:

> Upon being satisfied that the proposal form was in order a policy was issued.

Since the matter of agency was before him, the learned judge should have considered s. 149 of the Contracts Act 1950.

Section 149 reads:

> Where acts are done by one person on behalf of another but without his knowledge or authority, he may elect to ratify or to disown the acts. If he ratifies them the same effects will follow as if they had been performed by his authority.

In this case the person who signed the proposal form was not acting for itself but on behalf of the deceased. Pollock & Mulla on *Indian Contract and Specific Relief Acts,* 11th Edn., Vol. II at pp. 1119/1120 said:

> It is essential to an agency by ratification that the act to be ratified is one wherein the agent was not acting for himself but, on behalf of the named or ascertained principal.

Even though the proposal form for the P/A policy was not signed by the deceased, it was ratified by him when the premium for the policy was paid and for which a receipt was sent to the deceased (by the respondent company) acknowledging the payment.

The particulars in the proposal form were filled up by the clerk of the agent. In that case the knowledge of the agent is to be imputed to the respondent company. In this respect, Bailhache J in *Keeling v. Pearl Assurance Co. Ltd.* [1923] All ER at p. 309 said:

> No doubt, if the answers had been given by the assured, or by her husband, the policy would be void, but the agent in this case has inserted answers which are not consistent with, and in one case are certainly directly contrary to, the information which he had from the husband. If the knowledge of the agent is to be imputed to the insurance company, or if in filling up the proposal form he was acting as the agent for the insurance company, then, in as much as the answers are his own answers and not the answers of the assured, the policy is undoubtedly good.

In this case, there is no allegation by the respondent company that there was collusion or connivance between the agent and the proposer (deceased) or for that matter anybody else in the formation of the contract of insurance. Neither is there any allegation of fraud. By the deceased ratifying the proposal by payment of the premium and the acceptance of the proposal submitted by its agent by issuing a receipt for the premium received and the issuance of the PA policy, a valid contract was concluded (see *Borhanuddin bin Haji Jantara & Anor. v. American International Assurance Company Limited* [1986] 1 CLJ 532; [1987] 1 MLJ 22). It would be too late in the day for the respondent company to avoid liability by alleging that the signature on D2 was not that of the deceased.

The issue of agency is also covered by the Insurance Act 1996 (Act 553).

On knowledge of and statement made by an insurance agent, s. 151 of Act 553 reads:

> (1) A person who is authorised by a licenced insurer to be its insurance agent and who solicits or negotiates a contract of insurance in that capacity shall be deemed, for the purpose of the formation of the contract of insurance, to be the agent of the licensed insurer and the knowledge of that insurance agent shall be deemed to be knowledge of the licensed insurer.

(2) A statement made, or act done, by the insurance agent shall be deemed, for the purpose of the formation of the contract of insurance, to be a statement made, or act done, by the licensed insurer notwithstanding the insurance agent's contravention of sub-section 150(4) or any other provision of this Act.

(3) Subsection (1) shall not apply -

(a) where there is collusion or connivance between the insurance agent and the proposer in the formation of the contract of insurance; or

(b) ...

It seems clear therefore that unless there is evidence of collusion or connivance on the part of its agent the respondent company cannot repudiate liability. As stated earlier there is no allegation of collusion or connivance on the part of its agent by the respondent company. Hence the respondent company cannot repudiate its liability on the PA policy. Though this issue was submitted to the learned judge but unfortunately he did not consider it at all.

Counsel for the appellant also submitted that the learned judge should have invoked s. 114(g) of the Evidence Act 1950 against the respondent company for not calling David Lim or his clerk that the signature on D2 was not that of the deceased when it was the evidence of PW2 and PW3 that the deceased signed on both D1 and D2 on the same day. The presence of David Lim or his clerk who filled up the proposal forms would have cleared all doubt about the alleged non-signature of the deceased on D2. Not only was David Lim or his clerk not called, neither was any explanation given by the respondent company as to the non-availability of David Lim or his clerk who should be in the best position to give evidence on the signature in D2. The irresistable inference would be that if David Lim or his clerk is called their evidence would be unfavourable to the respondent company. We are of the opinion that counsel for the appellant was justified on this point but unfortunately the learned judge thought otherwise and declined to consider and invoke s. 114(g) of the Evidence Act 1950. Instead he went on a microscopic examination of the evidence of PW2 and PW3 where obviously, due to lapse of time, one cannot expect PW2 and PW3 to remember the minute details as stated by the learned judge in concluding that the evidence of PW2 and PW3 could not be accepted on the signature issue.

The learned judge himself observed that the signature on D2 (Fig. 6 Questioned Q at p. 166 of the Appeal Record) under 'DISCUSSION' in the opinion of Siow Kwen Sin, Forensic Document Analyst (DW2), (p. 161 of the Appeal Record) compared with that of the other specimen signature (especially the one in D1) were not written by the same hand. In fact, an

examination of the signatures on D1 and D2 would show a marked difference to the naked eye. In our view this marked difference would be obvious to the officer of the respondent company when perusing the two proposal forms submitted by its agent before accepting the proposals. However, it seemed that the respondent company chose to ignore it and issued the PA policy. In this respect, Bailhache J, in *Keeling v. Pearl Assurance Co. Ltd. supra*, touching on the mistake about the age of the assured, said at p. 308:

> Obviously, it must have hit them in the eye the moment they had the proposal form. Yet, notwithstanding that, they chose to issue a policy; and if they chose to issue a policy on a proposal form which contained a mistake, obviously, on the face of it, without further inquiry, there is no ground, in my opinion, for vitiating the policy.

It was clear to us that the learned judge did not consider the issue of ratification when obviously the agency issue was squarely before him and further, he had erred in declining to invoke s. 114(g) of the Evidence Act 1950 for the reasons stated by us.

In the circumstances the appeal was allowed with costs here and below. Judgment to the appellant as prayed. Deposit to be refunded.